BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARIA HINOJOS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,031,245
CARGILL MEAT SOLUTIONS CORPORATION	)	
Self-Insured Respondent	)	

ORDER

Claimant appealed the May 16, 2007, preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

Claimant alleges she injured her back working for respondent in a series of mini-traumas. This is the second time this claim comes before the Board. In the first appeal, the Board reviewed a January 11, 2007, Order Denying Compensation and remanded the claim to the Judge to determine the date of accident under K.S.A. 2005 Supp. 44-508(d) and then to consider the issue of timely notice in light of that finding.

Pursuant to the Board's order of remand, Judge Fuller conducted a second preliminary hearing, which was held on May 9, 2007. Following that preliminary hearing, Judge Fuller entered the May 16, 2007, Order in which the Judge determined the date of accident for claimant's alleged series of traumas was May 27, 2006, the date claimant was examined by Dr. Abay and, therefore, she knew her back pain was not related to a kidney problem and she believed it was a work-related condition. Moreover, the Judge found claimant failed to timely notify respondent of her alleged work-related accident or injury as she did not notify respondent she believed her condition was work-related until July 3, 2006, when she filed her claim for compensation. Judge Fuller wrote, in pertinent part:

> K.S.A. 2005 Supp. 44-508(d) gives guidance as to the date of accident in a repetitive trauma case. It is clear from the evidence that the Claimant's last day worked was February 12, 2006. As of that date through the following week, the Claimant believed the pain in her back was personal. This belief continued until she was examined by Dr. Abay on May 27 *[sic]*, 2006. As of that date, the Claimant knew that her back pain was not related to a kidney problem and she believed it was a work related condition. The Claimant's date of accident will be May 27, 2006.

> The Claimant had been having regular contact with the Respondent, yet, did not notify the Respondent that she believed her condition to be work related until July 3, 2006, when she filed her claim for compensation. K.S.A. 44-520 states that notice of an accident must be within 10 days or within 75 days for "just cause". Since Claimant's date of accident was determined to be May 27, 2006, the Claimant was required to give notice within ten days of that date. The ten day requirement will not be extended to 75 days as there was no showing of "just cause". Therefore, Claimant failed to give timely notice of injury.[1]

The only issue on this appeal is whether claimant provided respondent with timely notice of her alleged accident or injury.

Claimant argues the Judge erred by finding May 27, 2006, is the date of accident for this alleged repetitive trauma injury under the provisions of K.S.A. 44-508(d) as there is no evidence claimant received any written document on that date that stated her injury was caused by her work. Claimant contends the date of accident under K.S.A. 2005 Supp. 44-508(d) is July 3, 2006, the date of her written claim for compensation and, thus, the date she commenced this claim for benefits. Accordingly, claimant argues that she provided respondent with timely notice of her alleged accident.

Respondent contends claimant has failed to prove she did not receive a written communication from Dr. Abay that she injured her back at work as the doctor's May 25, 2006, report recites a history that claimant's symptoms began two years before after lifting heavy pieces of meat at the Excel Company in Dodge City. Consequently, respondent argues the Board should affirm the Judge's finding of the accident date. Respondent also argues K.S.A. 2005 Supp. 44-508(d) was enacted by the Kansas Legislature in 2005 but did not become effective until July 1, 2006. Accordingly, respondent argues the amendment is not applicable to this claim and the appropriate date of accident for claimant's alleged accidental injury is her last day of working for respondent, which was on or about February 13, 2006. Therefore, respondent argues claimant failed to provide timely notice of her accidental injury whether the accident date is either February 13, 2006, or May 27, 2006.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and the parties' arguments, the undersigned Board Member finds and concludes:

The Workers Compensation Act requires an injured worker to notify his or her employer of a work-related accidental injury within 10 days of the accident. But that period

[1] ALJ Order (May 16, 2007).

may be extended to 75 days when there is "just cause" for failing to provide notice within the initial 10-day period.[2]

Claimant worked for respondent in its meat processing plant in Dodge City, Kansas. It appears she began working at the plant in September 2002. Her last day of working for respondent was either February 12 or 13, 2006. Claimant alleges the work she performed for respondent caused repetitive trauma to her back.

In July 2006, claimant commenced this claim when she presented respondent with a written claim for compensation. And in August 2006, Dr. Abay operated on claimant's back.

The parties did not stipulate to the date of accident. Consequently, the date of accident for this alleged repetitive trauma injury must be determined before the issue of timely notice can be addressed.

Effective July 1, 2005, the Workers Compensation Act was modified to set the date of accident for repetitive trauma injuries. In short, K.S.A. 2005 Supp. 44-508(d) provides that the accident date for a repetitive trauma injury is the date an *authorized* doctor either prohibits a worker from working or the date the doctor restricts the worker from performing the work that caused the repetitive trauma injury. If the worker is not taken off work or restricted, then the accident date is the earlier of when the worker gives written notice to the employer or the date the worker's condition is diagnosed as being work-related, if that is communicated in writing. And if none of those situations apply, then the date of accident is the date determined by the administrative law judge based upon the evidence. K.S.A. 2005 Supp. 44-508(d) provides:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker.

[2] See K.S.A. 44-520.

> In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

As indicated above, claimant argues the date of accident should be July 3, 2006, when she allegedly presented respondent with a claim for compensation. Claimant argues July 3, 2006, is the appropriate date of accident as that was the date claimant is deemed to have given respondent written notice of the injury. Conversely, respondent argues May 27, 2006, should be deemed the date of the accident as claimant failed to prove she did not receive written notice from Dr. Abay that she had a work-related injury. In the alternative, respondent argues the date of accident should be February 13, 2006, as that was the last day claimant worked for respondent. In that regard, respondent contends July 1, 2006, was the effective date for the 2005 amendments to the above-quoted statute.

Contrary to respondent's belief, the effective date for the 2005 amendments to K.S.A. 44-508(d) was July 1, 2005, rather than July 1, 2006. Claimant worked for respondent through February 12 or 13, 2006. Therefore, K.S.A. 2005 Supp. 44-508(d) is applicable to this claim.

The present record fails to establish that claimant was notified in writing on May 25 or 27, 2006, that she had been diagnosed as having a work-related injury. The medical records introduced at the two preliminary hearings indicate claimant saw Dr. Abay on May 25, 2006, for a neurosurgical consultation. The notes generated from that visit indicate claimant told the doctor she had low back and bilateral lower extremity pain with her symptoms commencing two years before from lifting heavy pieces of meat while working at Excel Company in Dodge City. There is no evidence when, or if, claimant received that document. More importantly, that document does not diagnose claimant's condition as being work-related or otherwise state the doctor believed her back problem was caused or aggravated by her work. Consequently, the May 25, 2006, document does not trigger the date of accident under K.S.A. 2005 Supp. 44-508(d). The undersigned has been unable to find a medical note or report dated May 27, 2006.

The 2005 amendment to K.S.A. 44-508(d) does not specifically address whether an accident date can be found which is later than the last day a worker actually performs work. It is a truism that workers are not being injured at work when they are not working. But a literal interpretation of K.S.A. 2005 Supp. 44-508(d) would permit such finding.

Although the appellate courts have strictly construed the Workers Compensation Act in the relatively recent cases of *Boucher*[3] and *Casco*[4], the majority of the Board has come to conclude the legislature did not intend for K.S.A. 2005 Supp. 44-508(d) to be interpreted to set a date of accident for a repetitive trauma injury on a date after the worker stops working, when it is clear the repetitive trauma has ended. Accordingly, the majority of the Board now holds K.S.A. 2005 Supp. 44-508(d) should be interpreted to set a date of accident no later than a worker's last day of performing work.

Based upon the above interpretation of K.S.A. 2005 Supp. 44-508(d), the date of accident for claimant's back injury is February 12, 2006, which was the approximate date she last worked for respondent.

The Workers Compensation Act provides that an injured worker has 10 days following an accident or injury to notify the employer of the incident. And that 10-day period may be extended to 75 days when there was "just cause" for failing to provide notice within the initial 10-day period. At the January 10, 2007, hearing, claimant testified through an interpreter. Although claimant's testimony may have been clarified with certain follow-up questions, she testified she notified respondent's nursing station and her supervisor that her back pain was related to her work activities before she was sent for medical treatment. Consequently, respondent had notice of the back injury before claimant was told her back complaints were related to a kidney condition. Claimant testified, in part:

> Q. (Mr. Sanchez) During your time of doing the pastrami job, did you report any problems with your back to Cargill?
>
> A. (Claimant) The first time my waist started hurting, I reported to the nurse's station that my waist hurt, and she sent me with Dr. Marcia, so then Dr. Marcia when I went, she saw me and told me that I had -- my muscles were swollen and that the only thing that she could do was to put shots, give me shots on my waist. And after a couple of these, I didn't go to work for about 10 days.
>
> I would take the notes to the nurses, but they never said anything. The time would go by and I was working the same thing. And after four months, I went back to see the same; but before that, I told my supervisor that I was getting hurt. That if there was any way that my job could be changed.[5]
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[3] *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

[4] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

[5] P.H. Trans. (Jan. 10, 2007) at 6.

> Q. (Mr. Bangerter) When was the first time, then, that you told anyone at Excel that you felt that your back injury was related to your work and not a personal condition?
>
> A. (Claimant) Since the moment that I told the nurse that my waist hurt. She sent me with Dr. Marcia.
>
> Q. What was that date?
>
> A. Exactly, I do not know.
>
> Q. Was that after your appointment with Dr. Abay?
>
> A. It was after, later.[6]

The last answer quoted above is somewhat nebulous and may be construed in more ways than one. One such construction is that the appointment with Dr. Abay was after she had first notified respondent that her work was hurting her back. And considering claimant's testimony as a whole, that would appear the more likely scenario.

In conclusion, the undersigned Board Member finds claimant provided respondent with notice of her back injury and that it was related to her work activities before she left work in February 2006. Consequently, the notice was timely and the May 16, 2007, preliminary hearing Order should be reversed.

WHEREFORE, the undersigned Board Member reverses the May 16, 2007, Order entered by Judge Fuller. This case is remanded to the Judge for further proceedings consistent with the findings above.

IT IS SO ORDERED.

Dated this ____ day of July, 2007.

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge

[6] *Id.* at 11.